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Virtual Constitutions: The Creation of Rules for Governing Private Networks

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VIRTUAL CONSTITUTIONS: THE CREATION OF RULES FOR GOVERNING PRIVATE NETWORKS

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INTRODUCTION

Law always lags behind technology. In part, this is inevitable for a profession based on precedent, where the common law still reigns after nearly 500 years. Of course, the lawyers and judges who argue and decide the issues of technology and law are also somewhat responsible; legal education does not include basic engineering and electronics courses. The result of this myopia has been a frequent misunderstanding of the promise of new technology.

In 1915, for example, the Supreme Court ruled that movies were not protected by the First Amendment, but were merely "spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion."[1] Similarly, one court in 1968 held that cable television was not sufficiently "affected with a public interest" to permit local regulation.[2] The court reasoned: "The public has about as much real need for the services of a CATV system as it does for hand-carved ivory back-scratchers."[3]

In this age of high-speed computer networks, the nation's legal system again seems unprepared. The rapid growth of computer technology has left the law far behind. Computers and communications have been improving at the extraordinary rate of 25% a year for two decades.[4] Meanwhile, computing costs have been cut in half every three years since

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1. Mutual Films Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 244 (1915). This decision was not overturned until the middle of the century. Burstyn v. Wilson, 343 U.S. 495 (1952).

2. Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652 (N.D. Ohio 1968), *aff'd sub nom.*, Wonderland Ventures, Inc. v. City of Sandusky, 423 F.2d 548 (6th Cir. 1970).

3. 302 F. Supp. at 665.

4. Michael Dertouzous, *Communications, Computers, and Networks*, SCI. AM., Sept. 1991, at 63.

1950.[5] What began not long ago as just another ivory back-scratcher has suddenly become an omnipresent component of commercial and household existence. Ready or not, a legal framework must, and will, be created to respond to the introduction of computer networks into the fabric of everyday life.

As the use of private networks grows, the need for rules governing private networks will become increasingly acute. Questions of liability, freedom and responsibility will be resolved, either based on well-considered policy or as a haphazard response to a sudden crisis.

There are three ways in which the behavior of networks might be governed in the future. First, the United States Constitution could limit those networks that are considered "governmental." Next, for those networks characterized as non-governmental, legislatures and regulatory bodies may decide to impose a wide range of requirements and responsibilities. Finally, efficiency, necessity and fears of legal liability inevitably will lead many networks to create and develop their own "constitutions," to promote the general welfare of their users.

I. WHAT MAKES A NETWORK "PRIVATE"?

The determination of whether networks are governed by constitutional restrictions and how they should be regulated by the government cannot be answered in the abstract. There are simply too many types of networks. Further complicating the matter is the fact that, as the late Ithiel de Sola Pool noted, "[n]etworks, like Russian dolls, can be nested within each other."[6]

Defining a network is like trying to hit a moving target. New forms of networks are constantly being formed, in reaction to changes in technology, regulation and experience. The simplest network is created by linking together two computers.[7] A private corporation or university can create its own network, linking together all of the computers used by its employees.

Networks can also consist of services like CompuServe, Prodigy, and America Online.[8] These privately owned networks can offer their

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5. Lawrence Tesler, *Networked Computing in the 1990s*, SCI. AM., Sept. 1991, at 88.

6. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 199 (1983).

7. *See* OFFICE OF TECHNOLOGY ASSESSMENT, ADVANCED NETWORK TECHNOLOGY 5 (1993).

8. *See, e.g.*, Peter Lewis, *Anarchy, A Threat on the Electronic Frontier*, N.Y. TIMES,

millions of subscribers a wide range of "products," such as electronic mail, bulletin boards, news and games. Other networks, such as Usenet, provide access to countless electronic fora for almost any conceivable topic.[9]

Finally, there are the "networks of networks," most notably the Internet.[10] These "backbones" enable users to participate in thousands of smaller networks.

A second factor complicating any constitutional analysis is the degree to which a given network is "private." For purposes of this discussion, a private network will be defined as one which is restricted to authorized members, as opposed to a "public" network which operates as a classic common carrier, essentially accessible to all. Unfortunately, this definition of "private" (as perhaps would any definition of "private") leaves open many questions as to the "private" nature of a "private" network. The three major sources of confusion concern the issues of: a) whether a governmental entity owns or controls a network; b) whether the actions of a non-governmental private network will be deemed to be "state action"; and c) whether a non-governmental private network is truly "private," in the sense of being able to select whom to exclude.

A. Ownership of the Network

The Constitution draws a sharp distinction between the actions of the Government and those of the private sector. Whether the requirements of free speech, equal protection and due process, for example, will have to be obeyed will often turn on the ownership of a facility: is it owned by a governmental entity or by non-governmental parties? The government will often be constrained by constitutional requirements that do not apply when the government is not involved. A public (governmental) school library, for instance, will have far less discretion regarding decisions as to which books to discard than would a private (non-governmental) school library.[11]

May 11, 1994, at D1.

9. *See* MARK GIBBS & RICHARD SMITH, NAVIGATING THE INTERNET 194 (1993).

10. *See* TRACY LAQUEEY, THE INTERNET COMPANION 1 (1993) ("The Internet is a loose amalgam of thousands of computer networks reaching millions of people all over the world.").

11. *See* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (holding that the First Amendment limits the discretion of a public school board to remove books from a school library).

Not all governmental facilities, though, are treated as public fora for open discussion. Governmental entities have been permitted to close off certain communication facilities to the public. For example, a public school can limit an interschool mail system to union messages, while excluding mail from a rival union.[12] As the Supreme Court stated, in another context, the "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[13]

Nevertheless, the freedom of government to control its own property is limited. While the federal government can decide which charities are permitted to participate in a fund-raising drive among federal workers, it may not bar a charity due to "a bias against the viewpoint advanced by the excluded speakers."[14] Thus, even when the government acts in a "private" capacity, it is still limited by the Constitution. Because it is not a public forum, though, speakers can be excluded on viewpoint-neutral criteria.

It is evident, then, that a publicly-owned network can still be regarded as "private," if access to the network is limited and restricted. Such a government-owned, private network would still face the constitutional restriction against viewpoint-based discrimination, but would otherwise have generally the same discretion to control the content of speech as would a privately-owned private network. Conversely, a privately-owned network, such as AT&T or Bell Atlantic, can be considered a "public network," if it is open to all potential users. The general requirement of non-discriminatory access of a common carrier would regulate such a non-governmental public network.

Most networks will not fit these two categories. It will, perhaps, be easiest to think of a continuum between the exclusively private and the truly public. The vast majority of legal controversies will arise with the networks which are somewhere in the middle of this spectrum, used by more than just one entity (governmental or corporate), yet not generally viewed as common carriers. It is these privately-owned "private networks" that pose the newest, and perhaps most difficult, questions regarding the appropriate scope of limitations, if any, that should be imposed on network owners.

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12. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

13. Adderly v. State of Fla., 385 U.S. 39, 47 (1966).

14. Cornelius v. N.A.A.C.P. Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 812 (1985).

B. State Action

Further complicating this question is the concept of "state action," whereby certain actions of a non-governmental party are attributable to the government, and hence governed by constitutional mandates. If a private network were held to be a "state actor," its discretion over how to deal with users would be significantly restricted.[15] The most relevant constitutional provisions would likely be the First Amendment guarantee of freedom of expression, which generally prohibits content-based censorship, the Fourteenth Amendment guarantee of equal protection, and the Fifth and Fourteenth Amendment protections against loss of liberty and property without due process of law. The need for a theory of "state action" is based on the fact that the Constitution was only designed to restrict governmental behavior. Private parties are governed by laws passed by Congress or by state legislatures, but the Bill of Rights and the Fourteenth Amendment only apply to the government. Thus, a mob which prevents you from giving a speech has not violated your First Amendment rights. A police officer who wrongfully pulls you off a podium, however, is an agent of the city and would be guilty of violating your constitutional rights.

The resolution of a state action questions depends on whether the relationship between the government and a private party is such that the actions of the ostensibly private actor should be attributed to the state. For example, a non-governmental school can discriminate on the basis of race without violating the Constitution.[16] However, if a city permits such

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15. The Court faced a somewhat similar inquiry in trying to determine whether broadcast licensees were state actors. There was no majority opinion, but Chief Justice Burger wrote for a three-justice plurality that a finding of state action would destroy broadcast journalism:

> [I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. . . . Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest.

Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 120-21 (1973) (Burger, C.J., plurality opinion). By contrast, in the case of a common carrier, such as the post office or cable television as a provider of public and leased access, such constitutional standards would actually encourage free debate by enabling more speech.

16. Such a private school may still be subject to statutory and regulatory limitations. *Cf.* Bob Jones University v. United States, 461 U.S. 574 (1983) (upholding IRS denial of tax-

a discriminatory school to have "exclusive" use of municipal recreational facilities, such use would "significantly enhance[] the attractiveness of segregated private schools," and thereby violate the Equal Protection Clause of the Fourteenth Amendment.[17]

The state action issue for a particular privately-owned network will depend on a variety of factors. The relationship between such networks and the government is not only quite complex, it varies for different types of networks. The High Performance Computing Act of 1991 has further interwoven the Government and private sector.[18] In the Act, Congress established a super-network, the National Research and Education Network ("NREN"), to provide a "test bed" for the next generation of high-speed computer networks.[19]

It is not apparent how NREN will relate to the private sector.[20] The law specifies that NREN not be a competitor of private enterprises but instead should be "designed, developed, and operated in a manner which fosters and maintains competition and private sector investment in high-speed data networking within the telecommunications industry."[21] On the other hand, it is not clear whether there will be any private competitors for NREN.

By definition, everything NREN does is "state action" since it is governmentally created and controlled. The status of both the users of NREN and any super-networks that may duplicate NREN's services is far from clear. A changing technical environment makes predictions of legal conclusions speculative for the simplest legal issues.

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exempt status to discriminatory private schools).

17. Gilmore v. City of Montgomery, 417 U.S. 556, 569 (1974).

18. 15 U.S.C. §§ 5501-5512 (1993). For an excellent summary of the Act, see *Information Superhighway Bill Sketches Outlines of Ubiquitous Computer Network*, Daily Report for Executives (BNA), at C1 (Nov. 26, 1991).

19. *See generally* Andy Reinhardt, *Building the Data Highway*, BYTE, Mar. 1994, at 46. NREN will be built on an existing network, "NSFNET," which is run by the National Science Foundation. NSFNET is also the major backbone of the Internet. While only five percent of Internet's costs are paid for out of the federal treasury, a much larger federal outlay seems dedicated to NREN. Over the first five years of its existence, federal funding may grow to one billion dollars per year. The actual operating structure of NREN is not mandated by the law which established it. Control over NREN is centered in the Office of Science and Technology Policy, which will coordinate the involvement of many other federal agencies. Other agencies include the Department of Defense, the National Science Foundation, the National Aeronautics and Space Administration, the Environmental Protection Agency, the Departments of Education and Energy, and the National Institute of Science and Technology. Steve Higgins, *Senate Ponders $1.15B Proposal*, PC WEEK, Aug. 17, 1992, at 39.

20. Reinhardt, *supra* note 19, at 46.

21. 15 U.S.C. § 5512(c)(3) (1993).

Unfortunately, the state action doctrine is a labyrinth of competing policies and analyses. Its complexities have led one scholar to conclude, "[V]iewed doctrinally, the state action cases are a 'conceptual disaster area.'"[22]

Courts have held in one line of cases that only governmental coercion or encouragement of a specific private act will lead to a finding of state action: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . . ."[23]

In 1974, the Supreme Court ruled that a private electric utility's termination of service to a customer was not state action even though the Pennsylvania Utilities Commission ("P.U.C.") had approved the general tariff containing the termination procedures.[24] The Court explained that neither the existence of "extensive and detailed" regulation nor the P.U.C.'s approval of a general tariff would turn a private utility's acts into actions of the state.[25] The Court noted that the P.U.C. had never discussed the specific provision and that "there was no . . . imprimatur placed on the practice."[26] The Court did note that:

> It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.[27]

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22. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1690 (2d ed., 1988) (quoting Charles Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

23. Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982).

24. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

25. *Id.* at 350.

26. *Id.* at 357.

27. *Id.* at 350-51. In a similar vein, the Supreme Court held that a private club could discriminate against African-Americans even though it received one of only a limited number of liquor licenses from the Pennsylvania Liquor Control Board, and was subject to detailed regulation. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Because the discriminatory policy was not mandated by the Board, the Court held that the State's general regulation "cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." *Id.* at 176-77.

Heavy state funding may not even be enough to turn an enterprise public. A private school which taught special-needs students and received more than 90% of its funding from the state was permitted to fire an employee for speaking out against school policies, even though such a firing might have been unconstitutional had the employer been a public school.[28] The Court reasoned that the school's fiscal relationship with the State should be analogized to that of independent contractors performing services for pay, and thus should not result in a finding of state action.[29]

Under the reasoning of these cases, the vast majority of non-governmental private networks using NREN would maintain their private character unless their actions were either compelled by the federal government or induced by governmental encouragement. Governmental regulation and benefits received by the private networks would not turn otherwise private decisions into state action.

However, such an analysis may understate the unique advantage given to certain private networks by the Government. That special benefit, combined with an intermingling of governmental and private facilities, may be enough to support a finding of state action for at least some non-governmental private networks.

A series of Supreme Court cases have stressed that, even without the government mandating or coercing activity, state action will be found when an intertwining between the private and public entities indicates that the government, "has elected to place its power, property and prestige" behind a challenged private act.[30]

For example, the Supreme Court held that a "private" restaurant, located in a municipal building, violated the Constitution by its racially discriminatory policies.[31] The Court based its finding that the restaurant's actions were "state action" on a number of factors, including the fact that under the lease agreement, the city benefited financially from the economic effects of the private discrimination.[32] The Court concluded

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28. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

29. *Id.* at 843.

30. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding use of peremptory challenge by private civil litigant to exclude jurors based on race was state action).

31. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

32. *Id.* at 724 (stating that "profits earned by discrimination not only contribute to, but are indispensable elements in, the financial success of a governmental agency"). The Court also noted that the land and building were publicly owned, that the building was "dedicated to 'public uses' in performance of the Authority's 'essential governmental functions,'" and that the restaurant was a "physically and financially integral and indeed indispensable part,"

that the local government had neglected its constitutional duties by failing to limit contractually the restaurant's discriminatory practices:

> [By] its inaction, the [government] has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity.[33]

Like the restaurant in a public building, networks using NREN will be physically (or metaphysically) intertwined. Depending on the business relationship, the Federal government might well benefit financially from the actions of the "private" network. If such a network misuses its power, by, for example, banishing critics based on the content of their speech, it could be argued that the Government is putting its power, computing and otherwise, behind the misconduct. If so, the private network's actions might be characterized as state action.

A similar concern led the Court to strike down restrictive covenants which barred the sale of homes to "nonwhites."[34] Even though the covenants were contained in contracts between private parties, the Court held that judicial enforcement of those contracts would be unconstitutional. The Court concluded: "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."[35]

Although the actual covenant did not emanate from the state, and there was no evidence that the government encouraged the discrimination, state action existed because the government was facilitating the discrimination. Likewise, Justice Anthony Kennedy, writing for the Supreme Court, stated that peremptory challenges of jurors by private civil litigants were state action because of the "overt, significant assistance," of state officials in the discrimination:

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of the government's plan to operate as a self-sustaining unit. *Id.* at 723-24.

33. *Id.* at 725.

34. Shelley v. Kraemer, 334 U.S. 1 (1948).

35. *Id.* at 19. According to the Court, the state had "made available to [private] individuals the full coercive power of government" to deny buyers, on the basis of race, their right to purchase property. *Id.*

> Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court, 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'[36]

It could be argued as well that the federal government's infrastructure is essential for the larger, more powerful networks. A super-network, such as the NREN, provides "overt, significant assistance" which undoubtedly enables "private" networks to become economically viable. Thus, the government may find itself a party to challenged acts of such networks, even without active encouragement.

Certain private networks might also be analogized to company towns. The Supreme Court held that even though the streets of a town were privately owned, the First Amendment permitted Jehovah's Witnesses to leaflet on those streets, because: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free."[37] In language that could easily be applied to private network users, the Court stated that:

> [The residents of company towns] are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[38]

The reach of the company town concept was severely restricted when the Court held that there was no First Amendment right to petition in

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36. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991).
37. Marsh v. Alabama, 326 U.S. 501 (1946).
38. *Id.* at 508-509.

private shopping centers, and distinguished the company town because, unlike the shopping center, it had "all of the attributes of a state-created municipality."[39] Nevertheless, as networks develop, courts may find that they are far more essential for meaningful communication than shopping centers. Networks might carry all forms of electronic communication, and deprivation of access to a network might indeed impair the flow of public information.

For smaller networks, it is unlikely that state-action will be an issue. Such networks appear to be fungible, so that if one network is unsatisfactory, others are available. No single network is essential. However, if a bottleneck arises, whereby one or only a few entities control access, this issue will become far more significant. If a court finds that a private network has "monopoly power, via economic, physical or natural means, or via essential facilities,"[40] that court might be far more willing to conclude that the network's actions are state action. As such, the constitutional mandates in favor of freedom of expression and against censorship and discrimination would govern the largest private networks' decisions.

C. How Private is Private?

Another major source of confusion over the term "private" can be seen in the concept of a "private" club. Normally, the First Amendment permits individuals to select those persons with whom they will and will not associate.[41] For instance, one court has held that parade organizers have a constitutional right to bar others from marching in their parade, and that the government would violate the First Amendment if it tried to force them to permit others to march.[42] On the other hand, a so-called "private" club can be prevented from discriminating in its choice of

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39. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *See also* Hudgens v. NLRB, 424 U.S. 507 (1976).

40. Allen S. Hammond, *Regulating Broadband Communications Networks*, 9 YALE J. ON REG. 181, 234 (1992).

41. *See, e.g.*, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (describing the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends").

42. *See* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358 (S.D.N.Y. 1993) (permitting long-standing sponsor of St. Patrick's Day parade to exclude the Irish Lesbian and Gay Organization). *But see* Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston Allied War Veterans Council, 636 N.E.2d 1293 (Mass. 1994) (finding such exclusion would violate the First Amendment).

membership when it is large enough to resemble a place of public accommodation. For example, it is constitutional for the government to outlaw discrimination based on race, creed or sex in any club with more than 400 members that provides regular meal service.[43] As Justice O'Connor has observed, while an organization devoted solely to political or religious activity may have full constitutional protection against governmental interference, "there is only minimal constitutional protection of the freedom of *commercial* association."[44]

Thus, the government may be able to regulate access to a "private" network, if it involves only commercial association, especially if multiple firms are involved, or is so large that it loses any plausible claim of intimacy and homogeneity.

In sum, the "private" nature of a "private network" will not be resolved until we know the structure of the network system that is ultimately created and the path of analysis that is ultimately chosen by the Supreme Court. Until then, one hopes that the courts will strive to locate that narrow pathway that both limits governmental interference and prevents private monopolistic abuses.

II. WHOSE SPEECH IS IT ANYWAY?

When a network owner establishes a forum for the speech of network users—by creating bulletin boards, for example—wrangling frequently exists over two issues: who has the right to determine what speech is communicated and who is responsible for illegal speech. Without question, no party should ever be held legally responsible for speech which it had no power to prevent.[45] The harder question comes when a network owner tries to retain the right to bar speech it finds undesirable. The legal and policy problems are exacerbated when the network owner is unwilling or, for large networks, unable to preview and evaluate all of the speech on the network.

As an initial matter, network owners do have a right to define how their networks will be used. There is no sound reason to prevent a company from establishing a "family" network if there are other networks freely available. Many different types of networks would seem to further,

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43. New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988).

44. Roberts v. United States Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (emphasis added).

45. *See, e.g.*, Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959).

not deter, free expression. A danger of hypocrisy seeps in, however, if corporate criticism is censored as if it were equivalent to sexually offensive material. Confusion, if not charges of false advertising, will also await a network that leads users to view bulletin boards as open fora, without ensuring that all know that the network considers all speech as "its" speech. Ultimately, though, the issue may be decided not on the basis of public or corporate policy, but by legal rules that determine who should be held responsible for network speech.

The first judicial decision regarding a computer network's liability for the communications of its users came on October 29, 1991, in *Cubby, Inc. v. CompuServe, Inc.*[46] CompuServe is a network that provides its subscribers with access to numerous information sources, including more than 150 "forums," such as electronic bulletin boards, on-line conferences and databases. One forum, the Journalism Forum, is operated by Cameron Communications, Inc. ("CCI"). CCI had a contract with CompuServe under which CCI "agree[d] to manage, review, create, delete, edit and otherwise control the content of the [Journalism Forum], in accordance with editorial and technical standards and conventions of style as established by CompuServe."[47] CCI, in turn, had contracts with many electronic publishers, including Don Fitzpatrick Associates ("DFA"), which publishes *Rumorville*. DFA's contract required it to "maintain . . . files in a timely fashion," and stated that "DFA accept[ed] total responsibility for the contents of [*Rumorville*]."[48]

On more than one occasion in April 1991, *Rumorville* published unflattering statements about a competing service, *Skuttlebut*. The owners of *Skuttlebut* sued for libel, business disparagement and unfair competition. What distinguished this from the usual legal dispute was that they not only sued the head of DFA, which produced the material, but also sued CompuServe, which carried it. The key issue, according to the court, was to decide which print model should be applied to computer networks. At common law, anyone who repeated or republished defamatory information was as guilty as the original speaker.[49] Thus, if Anne said that Bob was a thief, and Carol's newspaper printed the charge, Bob could sue Carol for repeating the allegation.

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46. 776 F. Supp. 135 (S.D.N.Y. 1991).
47. *Id.* at 143.
48. *Id.*
49. RESTATEMENT (SECOND) OF TORTS § 578 (1977).

Booksellers and newsstand operators, though, are not generally characterized as "repeaters" unless they knew, or should have known of the defamatory content.[50] Thus, if David sells Carol's newspaper at his stand, David is immune from liability as long as he is unaware of the defamation. The reason for this exemption is obvious. To make booksellers and newsstand operators liable for everything they sell is to require them to be aware of everything they sell. As the Supreme Court has stated, "It would be altogether unreasonable to demand so near an approach to omniscience. . . . If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed."[51]

The court in *Cubby* ruled that CompuServe should be viewed as an electronic newsstand rather than a high-tech newspaper. The court reasoned that CompuServe "has no more editorial control over such a publication [as *Rumorville*] than does a public library, book store or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[52] Accordingly, even though CompuServe could refuse to carry a particular forum or publication within a forum, "in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents."[53] The legal result of the newsstand analogy is that CompuServe would be liable only if it "knew or had reason to know" of the statements.[54] Because no such knowledge could be proven or implied, CompuServe escaped liability on all counts.

Of course, if the network is not responsible for the publication, the focus will shift to the party who actually created the allegedly harmful material.[55] Such a ruling serves the interest of free communication. If networks are not held legally responsible for their users' communications networks will not have the same incentive to seek to control and censor such communications on the network. The court's decision thus helps to

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50. *E.g.*, Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981).

51. Smith v. California, 361 U.S. 147, 153 (1959).

52. *Cubby*, 776 F. Supp. at 140.

53. *Id.*

54. *Id.* at 141.

55. As of this date, there has been no resolution on the merits of *Skuttlebut*'s charges against *Rumorville*.

reduce the potential problems of censorship by electronic publishers, while maintaining individual responsibility for one's own remarks.

Unfortunately, network owners and users may find that the court's decision does not go far enough to protect freedom of electronic speech. This dilemma is illustrated by the crisis that confronted another network, Prodigy, which is a joint venture of Sears, Roebuck & Co. and I.B.M. Prodigy offers its more than one million subscribers access to numerous services, including over 100 electronic billboards. In mid-1991, one of the billboards began displaying vicious anti-Semitic messages, including statements that stories about the Holocaust were "a hoax," and that the extermination of Jews was "good idea."[56] The Anti-Defamation League of the B'nai B'rith ("ADL") complained to Prodigy and asked them to censor the offending items. At first, Prodigy refused, citing its policy of permitting free exchange on its bulletin boards.

Many found this argument insufficient. Prodigy, after all, had previously censored statements of which it disapproved. Prodigy had, in fact, advertised itself as a "family-oriented" service, and vowed to screen messages both electronically and with a five-person back-up crew that would remove any "offensive" statements that slipped through.[57] Previously, Prodigy had removed not only statements of an explicitly sexual nature, but also comments criticizing Prodigy for its actions. Apparently, the censors at Prodigy felt that corporate criticism was "offensive."

Given this background, Prodigy's acquiescence towards hate speech could easily appear as approval. Prodigy both retained the ability to delete messages which it felt were offensive and permitted the anti-Semitic tirades to continue. Therefore, the chairman and the director of the ADL concluded "that Prodigy did not regard [the anti-Semitic messages] as offensive. However, we did."[58] Finally, Prodigy relented, and announced that "offensiveness" included statements "grossly repugnant to community standards," including, presumably, those of bigots.[59]

The Prodigy incident reveals the weakness in the *Cubby* decision's protection for networks. As long as a network retains the power to

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56. Barnaby J. Feder, *Toward Defining Free Speech in the Computer Age*, N.Y. TIMES, Nov. 3, 1991, at E5.

57. *Id.*

58. Melvin Salberg & Abraham H. Foxman, *Letter to the Editor*, N.Y. TIMES, Nov. 15, 1991, at A30.

59. Feder, *supra* note 56, at E5.

censor, it risks being treated, both legally and in the world of public opinion, as an electronic editor who concurs with all statements on the network. Since CompuServe only avoided liability because it was ignorant of the message, it presumably would have been responsible for any repetition of the message once it received a complaint. Its refusal to censor a statement would then be viewed as an adoption of the statement as its own. Moreover, once a network is informed of a problematic statement somewhere in its system, it might well be said that the network has "reason to know" of the possibility of future similar statements and thus should monitor the offending speaker.

Such a rule would pose a grave threat to the free exchange of ideas on private networks. Owners would have to evaluate every communication about which they had received a complaint. This problem is not limited to libel. Allegations of invasion of privacy, copyright violations and even obscenity would force the network owners to use their power of censorship.

To make matters worse, the determination of what is constitutionally protected speech and what is illegal speech can be a difficult and uncertain legal decision. Risk-averse network owners will undoubtedly "steer far wider of the unlawful zone," in keeping out questionable speech.[60] Since the speech being silenced will not originate with the network operator, the desire to communicate one's own thoughts, which can counteract the chilling effect of restrictions on speech, will not deter network self-censorship.

In defending its right to censor offensive material, Prodigy stated that it had, by "using its editorial discretion, chosen not to publish . . . submissions and other similar material. . . . The First Amendment protects private publishers, like the New York Times and Prodigy, from Government interference in what we publish."[61] However, any network owner will eventually realize the impossibility of trying to censor all potentially damaging speech. Prodigy, for example, not only pre-screens messages, but also utilizes software to catch numerous expletives and otherwise offensive words and phrases.[62] Nonetheless, in early 1993 a

60. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (citing Speiser v. Randall, 357 U.S. 513, 526 (1960)).

61. Geoffrey Moore, *The First Amendment is Safe at Prodigy*, N.Y. TIMES, Dec. 16, 1990, at C3.

62. Sandra Sugawara, *Computer Networks and the First Amendment*, WASH. POST, Oct. 16, 1991, at A12.

Prodigy bulletin-board user was sued for libel and securities fraud for publishing negative statements about a small company in which he had invested and lost money.[63] The company did not sue Prodigy, but could it have? If a court took Prodigy at its word, then the offending comments were published as a result of Prodigy's editorial discretion and, like any private publisher, Prodigy should be held accountable for abuse of that discretion. However, this finding, combined with the impossibility of censoring all network speech, would quickly cause the end of bulletin boards and other network fora.

There are two solutions to this dilemma. Congress could pass a law, which would clarify the rule in *Cubby* and free network owners from legal responsibility for any programming they did not produce, unless they had notice of actual illegality. In other words, there would be no network liability for user speech until a court had found the speech to be beyond the protection of the First Amendment. Thus, the determination of the legality of the speech would be made by an impartial court, rather than a private network, while the party who produced the speech would bear the same responsibility as it would in a more traditional medium. The most obvious weakness to this proposal is that legislative action is difficult to obtain, especially if lawmakers would have to resist the call for greater censorship of unpopular speech.

One hopes that wise judges will make a similar ruling in the course of deciding litigation, but legal uncertainty will persist until such cases are decided. Also, networks like Prodigy that choose to retain the power to exclude messages which they find offensive may still be in legal limbo. It will not always be easy to discern the line between producing a message, which creates legal responsibility for the speech, and merely acquiescing in speech when one has the power to prevent it.

The alternate solution, which may require nothing more than a published policy, is for a network to forego all ability to censor communications in exchange for freedom from liability for the communications of others. One example of such a trade-off can be seen in cases freeing broadcasters from liability for programming they are required to carry. Federal law deprives a broadcaster of all "power of censorship" over material required to be broadcast under the "equal opportunities" law.[64]

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63. Amy Harmon, *New Legal Frontier*, L.A. TIMES, Mar. 19, 1993, at A1.

64. 47 U.S.C. § 315(a) (1988) states that if a broadcast licensee permits a candidate for public office to use the station, equal opportunities to use the station must be made available to all competing candidates.

The Supreme Court ruled that this requirement implies absolute protection for broadcasters against state-imposed liability for the material carried.[65] As one court noted in relieving a radio talk-show host of legal responsibility for statements made by an anonymous caller: "The impact of the censorship [if liability was imposed] would not fall upon the broadcaster's words and ideas; instead, it would be applied to the opinions and ideas of those members of the public who elected to participate in this kind of public forum."[66]

To avoid repeated litigation and network reviews of all information carried on billboard statements, e-mail, video programs and more, networks may be willing to agree to carry messages without regard to their content. Thus, these networks will be more like public parks, or at least common carriers, than similar private publications. Such an arrangement might be voluntary. To avoid legal uncertainty, however, the choice probably should be embodied in legislation. This would replace one editor with thousands, and multiply the electronic voices heard. To paraphrase the Supreme Court, such freedom for networks from liability would help prevent the danger of shutting off "an important outlet for the promulgation of information and ideas by persons who do not themselves" control computer networks "who wish to exercise their freedom of speech even though they are not members of the press."[67]

A useful, if surprising, analogy can be made between this vision of modern private networks and the role of printers in colonial America. In those days, because printing was still an art that was both expensive and not widely mastered, printers performed a vitally different function than they do today. Like many contemporary networks, printers viewed their job largely as that of preparing the writings of others for mass distribution. Printers, therefore, would publish diverse points of view, and often received criticism for their willingness to publish undesirable material.[68] In the 1730s, Benjamin Franklin was an influential Pennsylvania printer. On June 10, 1731, after enduring complaints about the writing he had printed, Franklin wrote his own defense, entitled "An Apology for Printers." He argued that printers should be not be treated as proponents of all that they publish:

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65. Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959).

66. Adams v. Frontier Broadcasting Co., 555 P.2d 556, 557 (Wyo. 1976).

67. N.Y. Times Co. v. Sullivan, 367 U.S. 254, 266 (1964).

68. *See, e.g.*, POOL, *supra* note 6, at 16 ("The printing press was a bottleneck where copies could be examined and controlled.").

> [Printers] chearfully serve all contending Writers that pay them well, without regard on which side they are of the Question in Dispute . . . . Being thus continually emloy'd in serving both Parties, Printers naturally acquire a vast Unconcernedness as to the right or wrong Opinions contain'd in what they print; regarding it only as the Matter of their daily labour: They print things full of Spleen and Animosity, with the utmost Calmness and Indifference, and without the least Ill-will to the Persons reflected on . . . .[69]

Franklin continued that printers should not be regarded as approving that which they print, and then warned of the consequences of condemning printers for the work of the writers:

> It is . . . unreasonable what some assert, "That Printers ought not to print any Thing but what they approve;" since if all of that Business should make such a Resolution, and abide by it, an End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinion of Printers . . . .[70]

The printers of the eighteenth century controlled access to the primary means of mass communication then available.[71] Private censorship by those printers would have resulted in a severe restriction on public debate. The largest networks may be in a similar situation at the conclusion of the twentieth century. It may be even more unreasonable for these networks, which carry millions of messages, to carry only those they approve. If such a situation occurs, "an End would thereby be put to Free [Electronic Communication] and the World would afterwards have nothing to read but what happen'd to be the Opinion of the [Network owners]."

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69. Benjamin Franklin, *An Apology for Printers*, PENN. GAZETTE, June 10, 1731, *reprinted in* LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 4-5 (1966). Franklin, never one to hold himself to too high a standard, freely admitted that he had often refused to print material that would "countenance Vice, or promote Immorality . . . [or] as might do real Injury to any Person . . . ." *Id.*

70. *Id* at 6.

71. *See, e.g.*, POOL, *supra* note 6, at 16.

III. PRIVATE NETWORK CONSTITUTIONS

A. General Discussion: The Purpose of a Constitution

To a nation, a constitution serves many different functions. On its most practical level, a constitution describes the ways in which those in political control may exercise their power. Next, a constitution can provide the framework for the rights of the individuals living within the country. It can delineate the line between public responsibility and private autonomy. Ultimately, though, a constitution defines the very character of a nation, directing what sort of country it wants to be, and is likely to become.

In many ways, constitutions for computer networks will operate in the same way. They will delineate the decision-making functions, outline the rights of network users, and both reflect and create a vision of what type of society we want within, and without, the universe of the network.

Assuming requirements are not imposed either by the courts or by the federal and local legislatures, networks will need to create their own. Because of the variety of private networks, it is impossible to create any one-size-fits-all document. Certain fundamental principles can be ascertained, however, based on the current state of and future plans for private networks, coupled with a look at the basic principles of a free society.

One of the more overlooked aspects in current discussions of broadband networks is that a new technology does not always require new rules. Just as it is an invasion of privacy to read someone's Post Office-delivered mail, it is an invasion of privacy to read his or her e-mail without permission. Just as a fast-food restaurant can prevent employees from receiving personal phone calls at work, an employer can prevent employees from using a company network for personal affairs.

Thus, some of the questions involving the next generation of private networks were answered long before there was a Silicon Valley. If a network is small—for example, an entirely in-house operation—there seems to be no logical reason why the network should be viewed any differently from traditional workplace equipment. If an employer wants to limit the access of certain employees to parts of the network, he or she should be able to do so. *Newsday*, concerned that its reporters were spending too much company time on e-mail, decided to alter its computer software to keep reporters from sending e-mail messages. Reporters were

only able to receive messages, but their editors continued to be able to send e-mail.[72] This may be a demeaning way to treat one's staff, but restricting reporters in this fashion is not analytically dissimilar from issuing a memo telling staff not to use copiers for personal items.

New thinking may be necessary when the technology poses new risks or creates novel opportunities. For example, if an ever-increasing amount of personal information is carried over networks, the threat to personal privacy also increases. Moreover, if it is easier to tap into a computerized database than the files inside a doctor's office, greater precautions are needed.

Privacy must be protected. There is both an economic value in private information (as evidenced by the sale of mailing lists) and a First Amendment interest in the dissemination of truthful information. Nonetheless, there is an overriding interest, both personal and societal, that a private citizen retain the ability to ensure that his or her private communications will not be subject to electronic intrusion. The growth of computer networks creates new threats to what has been termed "the right most valued" by civilized persons, "the right to be let alone."[73]

Networks must either ensure privacy or effectively inform all users that their communications are not private. Any contractual agreement permitting a network owner, or some other entity, to gather or disseminate personal information should be a knowing waiver. No "negative option," whereby a user waives privacy protection without affirmatively requesting it, should be permitted. As a matter of general principle, users should not be charged extra for routine privacy protection.[74]

For those networks that include numerous participants, privacy must be guaranteed even further. Absent a significant threat to the network's viability or purpose, the right to send a message privately must be preserved. Encryption should be permitted. Each disseminator of information should have the right and ability to control who receives his or her messages.

The battle over encryption is not merely one between a network owner and its users. The United States Government, concerned that encryption

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72. Lee Sproull & Sara Kiesler, *Computers, Networks and Work*, SCI. AM., Sept. 1991, at 116, 119.

73. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

74. COMMON CARRIER WEEK, Aug. 10, 1992 (discussing testimony of Marc Rotenberg, head of Computer Professionals for Social Responsibility, at forum conducted by the National Commission on Libraries and Information Science).

may threaten national security, proposed a system which would have effectively made any encrypted message "decodeable" by the National Security Agency. This proposal, which would have limited the ability to guarantee the privacy of one's electronic communications, was withdrawn in July 1994.[75]

B. Example: Anti-Competitiveness

One area where individual autonomy may conflict with the public interest involves anti-competitive behavior. The desire to enhance one's own economic standing at the expense of one's competitors may lead to inappropriate, if not illegal, use of the private network. The danger of anti-competitive behavior increases, as does the likelihood of antitrust law violation, where multiple large firms use a network to the exclusion or detriment of their competitors.

The antitrust laws view joint anti-competitive activity far more critically than unilateral anti-competitive action. The Supreme Court has held that concerted conduct violates the law if it merely restrains trade, while individual firm conduct is illegal only if it threatens monopolization.[76] In other words, an "unreasonable" restraint of trade may be permissible if imposed by a single firm, but not by two firms acting jointly.

In one of the first cases involving computer networks, airline computer reservation systems ("CRS") were held not to violate the antitrust laws.[77] In this case, American Airlines and United Airlines had each created their own CRS ("SABRE" for American and "Apollo" for United). Each had charged competing airlines a substantial fee for any of their flights booked through the system.[78] The court found the arrangement legal because the CRS neither eliminated nor threatened to eliminate competition in the air

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75. *See, e.g.*, Elizabeth Corcoran & John Mintz, *Administration Steps Back on Computer Surveillance*, WASH. POST, July 21, 1994, at A1.

76. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 774-77 (1984). In particular, Section 1 of the Sherman Antitrust Act bars combinations in "restraint of trade," 15 U.S.C. § 1 (1994), while Section 2 prohibits any "attempt to monopolize." 15 U.S.C. § 2 (1994).

77. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), *aff'g In re* Air Passenger Computer Reservation Sys. Antitrust Litig., 694 F. Supp. 1443 (C.D. Cal. 1988).

78. The Department of Transportation requires each CRS owner to charge its airline customers a uniform rate. 14 C.F.R. § 255.5(a) (1992). In 1991, American Airlines charged $1.75 per booking.

transport market. Moreover, each CRS was not treated as an "essential facility" because it was created by a single firm: "A facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market."[79]

Such unilateral power is not often found by courts. Only in extreme cases, such as the only local producer of electrical power refusing to sell to wholesalers in order to eliminate competition in the retail market, will there be the ability to eliminate competition.[80]

In the early 1980s, AT&T was found to have misused its control over an essential facility by refusing to allow MCI to interconnect with its local distribution facilities.[81] The court described four factors that determine if there is an antitrust violation by the unilateral owner of an "essential facility": a) It is controlled by a monopolist; b) there is a practical inability to duplicate facilities; c) the use of the facility to a competitor has been denied; and d) it would be feasible to permit use of the facility.[82] Another court has stated that a finding of "essential facility" requires a showing that "severe handicap" will result if the competitor is denied access.[83] In sum, a court will likely only find unilaterally-owned "essential facilities" if there is a showing that they involve "natural monopolies, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately."[84]

Certain larger networks, backbones or mid-levels, may qualify as "essential facilities." This determination is always case-specific, and courts will examine the practical reality as well as the theoretical possibility of constructing a competing network. As one court stated, just because Proctor & Gamble can bypass the local telephone loop, it hardly means that residential consumers have the same ability.[85]

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79. 948 F.2d at 544.

80. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 377-79 (1973).

81. MCI Communications Corp. v. American Tel. and Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983).

82. *Id.*

83. Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569-70 (2d Cir. 1990) (finding magazine not essential for sale of nutritional supplements) (citing Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1979)).

84. *Id.* at 569 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 680-81 (Supp. 1988)).

85. California v. F.C.C., 905 F.2d 1217, 123 (9th Cir. 1990).

Any private network operated by more than one competitor will face the heightened risk of violating the antitrust laws. If, for example, there are networks controlled by a few large players in an industry, anti-competitive network decisions may make the network owners liable for treble damages. Any action that is unjustifiable except as an attempt to harm competition may be considered an "unreasonable" restraint of trade. If, for example, several banks combined to create a network for the purpose of clearing checks, any exclusion of competing banks might subject the network owners to liability. Similarly, rules that disadvantage disfavored competitors would also be suspect.

In terms of procedures, traditional constitutional notions of due process would not apply (absent a finding of state action). Nonetheless, fundamental fairness in how the network treats its users would be necessary to prove "reasonableness." Procedures for resolving network disputes should be agreed upon, and made known to all users. Moreover, all similarly situated users should be equally treated. Before a small competitor is kicked off a network, the owners should be able to establish that a clearly enunciated, well-publicized rule was violated, that the offender was given a chance to explain its side of the story, and that similar previous violations were similarly punished.

By contrast, if a single bank creates such a network, it would have far greater discretion in treatment of its competitors. Unless it met the strict standard for "essential facilities," with the key inquiry being whether competitors could reasonably create a similar network, everything short of an attempt to monopolize would be permitted. On the other hand, blatantly anti-competitive action, especially if coupled with benign treatment of other competitors, might reduce the court's tolerance for unilateral action.

CONCLUSION

At some point, courts will need to resolve the question of how to apply an eighteenth-century constitution and even older common law to the communications technology of the twenty-first century.

Only by examining the various functions served by each network, and the interplay of government regulation and funding, will a logical, efficient and fair application of timeless principles be possible.

In the best of all worlds, truly private networks would create their own private constitutions for the betterment of all the network users, and

complex issues will be addressed well in advance of any crisis. Unfortunately, some private network owners will not make these decisions ahead of time because they will assume that their discretion will be forever unlimited. However, like those who die without seeing the need to write a will, these network owners may find that important decisions are ultimately made by a judge, and that the final dispositions are far different from those they would have preferred.